When the FCC adopted its Second Report and Order in 1975, it asserted, for the first time, the authority to adopt general rules restricting the right of newspaper publishers to operate broadcast stations in the communities in which their newspapers are published. Despite determining that "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership,"[8] the agency adopted regulations prohibiting the future grant of a broadcast station license to any party who "directly or indirectly owns, operates or controls" a daily newspaper published in the same community.[9]

In the Commission's view, the expansion of its role, from regulation solely of "communication by wire and radio,"[10] to the promulgation of rules on newspaper/broadcast cross-ownership, was justified on the basis of promoting diversity.[11] Upon its review of the evidence before it on cross-ownership in 1975, however, the FCC made a number of empirical findings, including that, in general, there was significant diversity or "separate operation" between commonly owned

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[8] Id. at 1075.

[9] See 47 C.F.R. § 73.3555(d) (1996) (formerly 47 C.F.R. §§ 73.35(a), 73.240(a)(1), and 73.636(a)(i)).

[10] 47 U.S.C. § 151

[11] See Second Report and Order, 50 FCC2d at 1050, 1079.

broadcast stations and newspapers;[12] and that newspaper-affiliated broadcast stations tended to be superior licensees in terms of locally-oriented service.[13]

The Commission concluded, nonetheless, to prohibit altogether any daily newspaper publisher from acquiring a new license for a broadcast station in its community or transferring an existing combination to new ownership. The sole basis cited for the prospective ban was the FCC's statement that "[w]e think that any new licensing should be expected to add to local diversity."[14] As to license renewals of existing combinations, however, the agency found that in the majority of cases a combination of factors, including "a long record of service to the public," possible "disruption for the industry," and "hardship for individual owners" outweighed a "mere hoped for gain in diversity."[15]

In reviewing the FCC's order, the United States Court of Appeals noted that "[t]he Commission enacted these rules without compiling a substantial record of

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[12] Id. at 1089.

[13] Id. at 1078-81. The FCC's own study, based on 1973 TV Station Annual Programming Reports, found that, on average, co-located newspaper-owned television stations programmed six percent more local news, nine percent more local non-entertainment programming, and twelve percent more total local programming than did other TV stations. See id. at 1094-98 (Appendix C). The Commission summarized these findings as showing "an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars." Id. at 1078 n.26.

[14] Id. at 1075.

[15] Id. at 1078. In sixteen so-called "egregious" cases, in communities in which there was only one newspaper and one television or radio station, however, the FCC ordered divestiture within five years. See id. at 1081-84.

tangible harm."[16] On the contrary, according to the Court, the record contained "little reliable 'hard' information."[17] The Court of Appeals expressly noted the absence of evidence in the record of specific anti-competitive acts by cross-owned stations.[18] Similarly, although it ultimately affirmed the prospective prohibition adopted by the FCC, the United States Supreme Court recognized that "the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice' or are harmful to competition."[19]

When the newspaper/broadcast cross-ownership restrictions were adopted in 1975, a total of 8,737 commercial radio and television stations were on the air.[20] At that time, there were an estimated 94 co-located newspaper/television combinations in the United States and, according to a study commissioned by the ANPA, an additional 380 newspaper/radio cross-ownerships.[21] As noted above, all but sixteen of those combinations were grandfathered by the Commission. For the past two decades, however, their owners have been precluded from acquiring additional stations in the

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[16] Nat'l Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 944 (D.C. Cir. 1977), aff'd in part and rev'd in part, 436 U.S. 775 (1978).

[17] Id. at 956.

[18] See id. at 959.

[19] FCC v. NCCB, 436 U.S. 775, 786.

[20] See Broadcasting & Cable Yearbook 1996 at B-671, C-244 (data as of January 1, 1975).

[21] See Second Report and Order, 50 FCC2d at 1061.

same markets and from selling their grandfathered combinations intact, to a single buyer. Moreover, daily newspaper publishers in other communities have been excluded from station ownership altogether, and local broadcasters have been barred from acquiring or establishing new daily newspapers in their communities of license.

NAA submits that Commission action to remove these constraints on publishers and station owners is long overdue. In the abundantly diverse and highly competitive mass media marketplace of the late 1990s, maintenance of these selective cross-ownership restrictions is clearly unnecessary, discriminatory, and unjustifiable. The "hoped for gain in diversity" that was the sole premise for adoption of the newspaper/broadcast cross-ownership prohibition in 1975 unquestionably has been achieved, not through governmental action, but through the technological revolution of the past two decades and the explosive growth in competition in the mass media marketplace. Accordingly, the Commission should begin the process of removing itself from its unnecessary and counterproductive involvement in this area.

III. THE MULTICHANNEL, MULTIMEDIA ENVIRONMENT OF THE LATE 1990s BEARS LITTLE RESEMBLANCE TO THAT OF 1975; BROADCASTERS AND NEWSPAPER PUBLISHERS FACE INTENSE COMPETITION FROM A RAPIDLY EXPANDING HOST OF MEDIA OUTLETS THAT PRESENT CONSUMERS WITH ABUNDANT INFORMATION OPTIONS.

When the Commission first promulgated the newspaper/broadcast cross-ownership rules in 1975, the mass-communications landscape -- with its foundation solidly grounded in newspapers, radio, and broadcast television -- bore little resemblance to today's multichannel, multimedia terrain. Over the course of the past two decades, the "traditional" media outlets have enjoyed dynamic growth while, at the same time, a diverse array of new entrants has fostered a thriving competitive marketplace. Moreover, the maturation of the cable television industry along with technological innovations such as direct broadcast satellite ("DBS") service and the Internet -- which has emerged virtually overnight as a major source of information and viewpoints on every subject imaginable -- now ensure the availability of a multitude of independent and diverse media voices to American consumers.

A. The Enormous Growth and Near-Universal Availability of the Traditional Broadcasting Media, Newspaper Publishing, and Cable Television Have Transformed the Media Marketplace Over the Past Two Decades.

1. The Number and Variety of Radio Broadcast Stations Have Increased Dramatically Since 1975.

Radio broadcasting has continued to enjoy dynamic growth since 1975 in nearly every aspect of marketplace measurement. As a result, a wealth of local, regional, and national programming options are available to listeners. Since the adoption of the newspaper/broadcast cross-ownership restriction, the total number of licensed radio stations in the U.S. has increased by nearly 50 percent -- from 8,094 in January 1975[22] to 12,151 by the end of January 1997.[23] Much of this rise can be attributed

[22] See Broadcasting & Cable Yearbook 1996 at B-671.

[23] Broadcast Station Totals as of January 31, 1997 (FCC Mimeo No. 72140, rel. Feb. 5, 1997).

to the rapid expansion of FM radio; the number of FM stations licensed today, 7,297,[24] is more than double the number (3,617) authorized in 1975.[25]

Further evidence of the highly competitive nature of today's radio marketplace is provided by examination of the relevant statistics for virtually any U.S. city. For example, Evansville, Indiana, ranked as the 150th largest market by Arbitron, has ten radio stations competing for advertising revenue, and six of those stations billed in excess of $1 million annually.[26] Competition is even more vigorous in larger markets. In Salt Lake City, Utah, the 35th largest market, for example, market guides list twenty radio competitors (and thirteen separately owned radio groups), seventeen of which have advertising billings in excess of $1 million annually.[27]

Given this increase in the sheer number of radio stations, and the related drive to continually increase audience levels and advertising revenues, it is no surprise that station managers have shifted away from generic, lowest-common-denominator content and instead have focused on offering programming that meets the needs of their local communities. Indeed, radio has seen an explosion in program format diversity in recent years. Broadcasting & Cable Yearbook, which tracked just fifteen format options as recently as 1982, now recognizes ninety-one distinct radio formats.[28] Of

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[24] Id.

[25] Broadcasting & Cable Yearbook 1996 at B-671.

[26] See James H. Duncan, Duncan's Radio Market Guide (Jan. 1996 ed.).

[27] See id.

[28] Compare Broadcasting & Cable Yearbook 1982 at D-77 - D-98, with Broadcasting & Cable Yearbook 1996 at B-589.

principal importance with respect to the issues under consideration in this proceeding are increasingly popular radio formats such as "educational," "news," "news/talk," "public affairs," and "talk." By the end of 1995, 712 stations aired a "news" format, 538 carried "talk" programming, and 1,022 aired "news/talk."[29] In addition, instructional educational formats were broadcast on 252 stations, and 62 "public affairs" formats were available to listeners in various communities nationwide as well.[30]

In addition to the recent diversification in available radio format choices, consumers also benefit from the number and variety of regional and syndicated radio programming networks in the radio marketplace. Aside from the major national radio networks, there are over sixty regional networks that include programmers such as the Illinois News Net and the South Carolina Network.[31] In addition, stations can purchase radio programming material from any of the nation's 243 syndicated radio programmers.[32] This abundant choice of programming offerings, coupled with the tremendous increase in program format diversity and growth in the number of radio

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[29] See Broadcasting & Cable Yearbook 1996 at B-590. A radio format is defined as programming broadcast at least 20 hours weekly. See id. at B-589. Thus, a station airing a combination of formats may appear under more than one format listing, though some formats, such as "news/talk" and "news," do not appear to overlap. See id. at B-623-26.

[30] See id. at B-590.

[31] See Radio Business Report: Source Guide and Directory at 5-23 (Vol. 2 1994).

[32] See id. at 5-23 - 5-24.

stations, reveals a healthy, competitive radio marketplace offering consumers a wide range of independent voices and diverse program content.

2. The Number and Variety of Newspapers and Their Ability to Reach Diverse Segments of the Population Also Have Increased Greatly.

Since the newspaper/broadcast cross-ownership ban was first instituted, the number of daily newspapers published in the United States has declined from 1,756 to 1,532.[33] Nevertheless, overall circulation of U.S. daily newspapers has held relatively steady, declining from 60.7 million to 58.2 million total morning and evening, but increasing from 51.1 million to 61.8 million on Sundays.[34] At the same time, smaller independent local newspapers, many of which are published weekly, have thrived. In 1975, the 7,612 weekly newspapers in the U.S. enjoyed an average circulation of approximately 35.9 million per week.[35] By the end of 1995, however, the number of such newspapers had risen to 8,453, with a staggering leap in weekly circulation to nearly 80 million.[36] Much of this growth is due to the widespread proliferation of independent weekly newspapers that focus on serving local community

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[33] See Newspaper Association of American, Facts About Newspapers 1996 at 23 (1996) ("NAA Facts About Newspapers").

[34] See id. at 13.

[35] See id. at 25.

[36] See id. Although NAA changed its information collection procedures for the years 1994-95, the total circulation of weekly newspapers in 1993, the most recent statistically comparable year, had risen to 56.7 million. Id.

needs.[37] By covering local politics, neighborhood businesses, and other local and regional concerns and developments, the hundreds of independent weekly newspapers that have sprouted up nationwide are providing a valuable alternative outlet for speakers who address primarily local audiences.

3. Over-the-Air and Cable Television Offer a Rich Diversity of Programming to Virtually Every Household in the United States.

Since the Commission instituted the cross-ownership limitations, television programming, both over-the-air and cable-delivered, has enjoyed continued growth and ever-increasing diversity. Since 1975, the number of licensed television broadcast stations has increased from 1,010[38] to 1,556,[39] a gain of more than fifty percent. In addition, nearly all viewers now are presented with a substantial number of over-the-air television programming selections. Even six years ago, when the Commission released the results of its staff's study of the video marketplace, 95 percent of all television households were in markets with five or more television stations, and the majority of television households were in markets with ten television stations or more.[40] Additionally, in the near future, digital television, which is expected to be in homes by

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[37] See Elizabeth Gleick, Read All About It, Time, Oct. 21, 1996, at 66, 69.

[38] See Broadcasting & Cable Yearbook 1996 at C-244.

[39] Broadcast Station Totals as of January 31, 1997. (FCC Mimeo No. 72140, rel. Feb. 5, 1997).

[40] See Florence Setzer and Jonathan Levy, Office of Plans and Policy, Fed. Communications Comm'n, Working Paper No. 26, Broadcast Television in a Multichannel Marketplace, DA 91-817, at 4013-14 (rel. June 27, 1991) ("OPP Working Paper").

1998, will offer far more channel capacity than present-day broadcast television, a sharper picture, and CD-quality sound.[41]

The healthy growth in broadcast television, moreover, has been complemented by remarkable gains both in penetration and in subscribership by the cable television industry. Indeed, cable television is now a permanent feature of the mass-media landscape; cable is presently available to 97 percent of all U.S. households, and two-thirds of all U.S. television households subscribe to cable service.[42] By contrast, in 1975, when the Commission adopted the newspaper/broadcast cross-ownership restrictions, only 17 percent of U.S. television households subscribed to cable.[43] This explosive growth has contributed substantially to the variety of media voices available to consumers. Cable television systems offer a broad range of programming -- local and regional offerings in particular -- and compete aggressively with over-the-air services as well as with daily newspapers for subscribers (viewers) and for advertising revenues.[44]

Today, nearly 80 percent of cable systems have the capacity to offer thirty or more cable channels and nearly one-half of all cable subscribers are served by high

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[41] See Mark Landler, Industries Agree on U.S. Standards For TV of Future, Wall St. J., Nov. 26, 1996, at A1.

[42] See Paul Kagan Assoc., Inc. The Kagan Media Index, No. 117, Nov. 30, 1996, at 8 ("The Kagan Media Index").

[43] OPP Working Paper at 4008-09.

[44] In 1995, the cable industry accounted for $3.6 billion in advertising revenues, or 2.2 percent of the national total, an increase of 18.5 percent over the previous year. See NAA Facts About Newspapers at 10. Cable advertising was virtually non-existent in 1975. See OPP Working Paper at 4047.

capacity systems that provide 54 or more channels.[45] Moreover, fiber optics, digital signal compression, and a host of other technological advances promise to allow cable systems (not to mention telephone video providers) to offer hundreds of channels in the foreseeable future. The sheer number of current channels, and the likelihood of substantial increases in channel capacity in the near future, has led to a tremendous increase in the number of programming options available to video consumers. At present, there are over 100 national and regional cable programming networks.[46] In the past ten years alone, the combined full-day audience of cable networks increased from an 11 percent share to a 30 percent share of television viewing hours.[47] In addition, virtually all cable systems offer public, educational and governmental ("PEG") channels, and many offer local cable news, educational, and public affairs programming as well. Moreover, many cable systems, hoping to augment their available content options, have begun to offer audio programming in direct competition with local radio broadcasters. For example, in Omaha, Nebraska, Cox

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[45] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket 96-133, FCC 96-496 ¶¶ 16-17 (rel. Jan. 2, 1997).

[46] See id. at Appendix G, Tables 1-2. The Commission's Report lists 67 national programming services owned, in part, by cable operators and another 80 independently owned national programming services. See id.

[47] Id. ¶ 18. At the same time, the combined audience of the network affiliated, independent, and public broadcast television stations has decreased from an 87 percent share to a 72 percent share of television viewing hours. See id.

Communications offers consumers thirty-one channels of digital music as part of its cable television subscription package.[48]

B. A Vast Array of New Multichannel Services and Competitive Video and Audio Alternatives Has Emerged to Provide Consumers with Even More Programming and Information Options.

1. Videocassettes, Wireless Cable, and SMATV Have Developed As Significant Alternative Information/Entertainment Providers.

Apart from newspaper, radio, and broadcast and cable television, a number of alternative entertainment and information mechanisms not widespread or, in some cases, even in existence when the Commission first promulgated the newspaper/broadcast cross-ownership rules now foster vigorous competition among content providers. For example, videocassette sales and rental outlets now compete for consumers' entertainment dollars. About 80 percent of American households have VCRs, and videocassette rental and sales revenue in 1995 approached $15 billion.[49] Moreover, advertisers are increasingly turning to videocassettes as a mechanism for disseminating product information or conducting product demonstrations in the privacy of consumers' homes. By contrast, in 1975 the home-video industry was non-existent.[50]

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[48] See Jim Minge, Digital Radio New Choice, The Omaha World-Herald, Mar. 2, 1996, at 53-SF.

[49] See The Kagan Media Index, at 14.

[50] See OPP Working Paper at 4008 (Table 1).

On another front, publishers and broadcasters face competition from recent multichannel service entrants such as satellite master antenna television ("SMATV") and wireless cable ("MMDS"). As of October 1996, SMATV systems served 900,000 homes, while wireless cable systems served an expanding base of one million customers nationwide.[51]

2. Direct Broadcast Satellite Service Has Blossomed in Recent Years and Now Stands as a Significant Competitive Threat to the Cable Industry.

The dramatic entry of DBS as an affordable television alternative is further evidence that the modern media bazaar is a highly-charged competitive environment. DBS systems offer subscribers dozens of high-quality digital channels for a monthly fee that is competitive with cable television rates.[52] Since their introduction just two years ago, consumers have purchased more than 3.5 million mini satellite dishes;[53] manufacturers have at times been unable to keep up with demand.[54] At present, five providers compete to offer consumers DBS programming: DirecTV Inc., U.S. Satellite

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[51] See The Kagan Media Index, at 8.

[52] See Doug Abrahms, Satellite Firms Dish Out TV Alternative to Cable, Wash. Times, Dec. 2, 1996, at D6.

[53] See Jim McConville & Harry A. Jessell, Competition From the Sky: The War for TV Homes is Heating Up as DBS Attempts to Win Over Cable's Subscribers, Broadcasting & Cable, Nov. 25, 1996, at 22.

[54] Doug Abrahms, Pizza-Sized Dish is the Hottest Item on Home Telecommunications Menu, Wash. Times, Feb. 4, 1995, at C1.

Broadcasting Corp., Primestar, EchoStar, and Alphastar.[55] One recent DBS entrant, EchoStar, which inaugurated service this past spring, has already enrolled 235,000 subscribers and boasts gains of 10,000 to 12,000 new customers per week.[56] The continued rapid development of the DBS industry ensures that yet another long-term alternative media voice will compete in the mass media marketplace.

3. Satellite DARS Will Soon Enter the Marketplace and Provide a Multichannel Alternative to Conventional Radio Broadcasting.

Satellite-based radio, still in its infancy, may soon deliver a digital line-up of thirty channels of news, music and entertainment, adding another voice to the highly competitive media fray. To date, four DARS applicants have sought Commission authorization to beam CD-quality sound to newly developed radio sets.[57] At least one applicant, Primosphere, has announced plans, should it obtain a license, to provide DARS service to customers free-of-charge, relying on advertising sales to generate

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[55] See Albert B. Crenshaw, Satellite TV Services: Choices Can be Numbing, Wash. Post, Nov. 24, 1996, at H1.

[56] See McConville, supra note 53, at 22, 24.

[57] CD Radio, Inc., Primosphere L.P., Digital Satellite Broadcasting Corp., and American Mobile Radio Corp. all have filed applications to offer DARS service. See FCC Proposes Rules for DARS Service; Spectrum Auction on the Way, Satellite News, Nov. 18, 1996.

revenue.[58] More recently, an FCC advisory panel recommendation set the stage for a spectrum auction slated for mid-April of 1997.[59]

4. Telco Entry Into Video Programming May Soon Transform the Marketplace.

When the Telecommunications Act of 1996 was signed into law, it brought an end to the long-standing telco/cable cross-ownership ban. Under the new statutory regime, telephone companies can now actively compete in the video programming marketplace within their local service areas. In eliminating the telco/cable cross-ownership ban, Congress provided local exchange carriers ("LECs") with the option of offering video programming by operating a cable system, via wireless microwave-based cable technology, or by establishing an Open Video System.[60]

Already, LECs are enthusiastically embracing the opportunity to establish a new media voice. For example, Ameritech has obtained more than two dozen local cable television franchises and plans to build state-of-the-art systems to provide consumers with a competitive choice.[61] Another LEC, Pacific Bell, is anticipating a rollout of a

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[58] See id.

[59] See Auction Expected Soon; Panel Denies Pioneer's Preference to DARS Applicants, Comm. Daily, Nov. 20, 1996, at 4.

[60] See Telecommunications Act of 1996, Pub. L. No. 104-104, § 302, 110 Stat. 56, 114 (amending §§ 651(a)(3) (Cable Systems), 651(a)(1) (Wireless Cable), 653 (Open Video Systems) of the Communications Act of 1934)).

[61] See Briefly Noted: Ameritech Corp's Ameritech New Media Unit, Interactive Video News, Oct. 14, 1996; Thomas P. Cohan, Cable Competition: The Key to Consumer Choice, Nation's Cities Weekly, Vol. 19, No. 44, Nov. 4, 1996, at 2.

commercial digital wireless cable system in the Los Angeles area by early 1997.[62] Also, one local exchange carrier, Bell Atlantic-New Jersey, Inc., has obtained FCC approval to operate an Open Video System in Dover Township, New Jersey.[63] The long-term effect of telco entry, as intended by Congress, will be to foster the growth of new voices in the media marketplace while offering ever-increasing information and entertainment alternatives to consumers.

5. The Internet Has Emerged Virtually Overnight as a Major Information/Entertainment/Advertising Alternative.

Perhaps more than any other recent development, the emergence of the Internet, and its user-friendly interface known as the "world-wide web," holds the promise of universal access to virtually limitless sources of information. Worldwide computer networking for the average consumer via the Internet simply did not exist even a few years ago, let alone when the Commission first promulgated the newspaper/broadcast cross-ownership ban. But today, between twenty-five and forty million Americans are "on-line" via direct connections to the Internet,[64] with millions gaining access via nation-wide on-line computer networking services such as America Online,

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[62] Brad Smith, PacTel Sees Video's Future as Wireless, Broadcasting & Cable, Vol. 126, No. 29, July 8, 1996, at 36.

[63] Bell Atlantic-New Jersey, Inc. Certification to Operate an Open Video System, 11 FCC Rcd 13249 (1996).

[64] See Edward Epstein, Internet Alters Art of Campaigning, S.F. Chronicle, Oct. 14, 1996, at A7.

CompuServe, and Prodigy.[65] The Internet is an ideal medium through which to communicate both with members of the local community and with a broader national, and even worldwide, audience.

Already, the Internet has made substantial inroads as a mechanism for amplifying political debate. Following last year's election, approximately 8.5 million voters said that information they obtained on the Internet influenced their vote.[66] In addition, Internet-based offerings from non-traditional media entities have recently sprouted up. One example is Slate, a magazine published by software manufacturer Microsoft which has former CNN pundit Michael Kinsley at its editor's desk.[67] Another original content provider is NetRadio Network, a 24-hour Internet radio network that creates customized programming for users based on their personal profiles.[68]

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[65] See Doug Abrahms, AOL Often AWOL, But Users Aren't Deserting: Net's Gains Seen as Encroaching on TV, Wash. Times, Jan. 27, 1997, at A1.

[66] See Rajiv Chandrasekaran, Politics Finding a Home on the Net; Post-Election Surveys Show the Web Gains Influence Among Voters, Wash. Post, Nov. 22, 1996, at A4.

[67] Charles Waltner, In Web Years, Kinsley is Nearly a Veteran Now: After 4 Months Online, Slate's Editor Has Faith in the Medium, If Not Proof, Advertising Age, Nov. 4, 1996, at S18. Newspaper publishers also are utilizing the Internet as an additional outlet for providing news and information to the public. More than 230 North American daily newspapers have launched on-line services ranging from web sites to services with consumer on-line companies and local bulletin boards. NAA Facts About Newspapers at 12.

[68] See Kate Maddox, Web Business Advances to Next Stage -- Customized Content With Adaptive Response Capabilities Shores Up Electronic Commerce, CommunicationsWeek, Sept. 30, 1996, at 53. In fact, 846 radio stations already have sites on the Internet. See Broadcasting & Cable Yearbook 1996 at B-673 - B-688.

Enhanced computer networking capabilities, such as real-time audio and video feeds, made possible by new high-speed Internet connections, promise to furnish consumers with even greater access to additional information alternatives from this burgeoning new medium. One high-speed access option, Integrated Services Digital Network ("ISDN"), which utilizes existing copper telephone plant, had 450,000 lines operating at the end of 1995 with expectations of 800,000 users on-line by the end of 1996.[69] Another high-speed approach, a satellite-based Internet transmission system now available nationwide, utilizes a 21-inch satellite dish to receive Internet downloads at speeds up to fourteen times faster than traditional telephone modems.[70] Meanwhile, cable operators, anxious to participate in the Internet revolution, are beginning to roll out high-speed networks using coaxial cable-based modems in several U.S. cities.[71] As new technological pipelines are deployed, and as the computer-based information services industry matures, consumers will reap the benefits of expanded access to community, local, regional, and national news, political discussion, civic discourse, and other information resources.

Recent efforts by the White House promise to ensure the long-term viability of the Internet as a mass-communications medium. Recognizing the potential educational

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[69] See Room for All: ISDN, Cable Modems and DSS Compete for Retail Dollars, Comm. Daily, Mar. 29, 1996, at 5.

[70] See Satellite 'Net Access Offers Interim Broadband Solution, Internet Week, Nov. 25, 1996.

[71] See Cox, Cablevision Systems Launching Cable Modem Services, Media Daily, Sept. 13, 1996; Cathy Taylor, Key to the Highway: At Long Last, Cable Modem Rollout Begins from TCI, Time Warner; Tele-Communications Inc., MEDIAWEEK, Sept. 9, 1996, at 5.

value of high-speed access, President Clinton has urged both the Commission and the communications industry to connect every school and library in the nation to the Internet.[72] Additionally, the President has called for $100 million in Federal funds to enhance the speed and capacity of the Internet.[73]

C. Outlets for Local and National News are Blossoming as the Media Increasingly Target Local Audiences and Specialized Information Needs.

In addition to the growth in the number and variety of media outlets since the newspaper/broadcast cross-ownership rules were adopted, there has been a proliferation of local, regional, and national news programming. For example, as noted above, "talk radio" has become an increasingly prominent force in the development of a rigorous, robust forum for political discourse, as have other "civic-minded" radio formats such as news/talk, public affairs, and educational programming.[74]

Similarly, local newspapers -- often published with a suburban or ethnic[75] bent -- today provide a rich resource for readers concerned with community affairs and local politics. These and countless other regional newspapers emphasize community-oriented reporting. One executive, who manages twenty-one local newspapers for the New

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[72] See Jube Shriver, Jr., FCC Urged to Require Wiring of Schools, Libraries for Info Age Policy, L.A. Times, Oct. 11, 1996, at D2.

[73] See id.

[74] See supra Section III.A.1. (discussing popularity of newer radio format options).

[75] For example, currently on the nation's newsstands are some twenty Russian-language and over sixty Vietnamese-language newspapers. See Elizabeth Gleick, Read All About It, Time, Oct. 21, 1996, at 66, 69.

York Times Co., recently delivered the forecast for regional newspapers, proclaiming that "[t]he future is local, local, local, and nobody is going to out-local us."[76]

Americans also have benefitted in recent years from the development of several successful national news media outlets. USA Today has emerged as a national newspaper, successfully competing with other longer-established papers such as The Wall Street Journal[77] and New York Times. In television news, CNN has successfully developed an all-news format which has been mimicked at the local level both by television broadcasters and by cable system operators. In addition, a number of competitive entrants at the national level, specifically MSNBC and the Fox News Channel, now threaten to challenge CNN's dominance in the cable television news programming field.[78] There can be little doubt, then, that in the past two decades American consumers have been the beneficiaries of an abundant and ever-expanding array of local, regional, and national news and information sources.

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[76] Id.

[77] The Commission has determined that national newspapers such as USA Today and The Wall Street Journal are not subject to the cross-ownership restriction. See Stockholders of CBS Inc., 11 FCC Rcd 3733, 3779 (1995); Gannett Co., Inc., 102 FCC2d 1263, 1266 (1986).

[78] See Richard Zoglin, The News Wars: On TV and Radio, in Print and Over the Internet, News is Everywhere. But Are We Better Informed or Just Overwhelmed?, Time, Oct. 21, 1996, at 58, 60.

D. Broadcasters and Newspaper Publishers Face Additional Competitive Pressures from a Wide Variety of Non-Media Sources.

The variety of media and non-media sources competing for advertising dollars eliminates any danger of undue concentration in the economic marketplace should the newspaper/broadcast cross-ownership restrictions be relaxed. For example, direct mail advertising has grown at an exponential rate and now closely rivals total daily newspaper advertising. Expenditures on direct mail in 1995 were nearly $33 billion, or 20.4 percent of all advertising expenditures, and nearly three times the amount spent on radio ads.[79] Magazine sales, particularly by increasingly popular city, regional, and specialty publications, also have eroded newspapers' share of advertising revenues while providing additional sources of information and opinion. Magazines now generate $11.5 billion annually in advertising revenues,[80] and account for 5.4 percent of all advertising expenditures.[81]

Other competitors for advertising dollars include shoppers, pennysavers, bus and cinema advertising, which, along with other "miscellaneous" advertising vehicles, brought in over $20 billion in advertising revenues in 1995, or 12.6 percent of the national total.[82] Yellow pages and outdoor advertising also provide very substantial competition for advertising revenues, together accounting for 7.2 percent of 1995 ad

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[79] See NAA Facts About Newspapers at 10.

[80] See The Kagan Media Index, at 15.

[81] See NAA Facts About Newspapers at 10.

[82] See id.

revenues.[83] Current advertising revenue figures do not include the use of the Internet for advertising purposes. The Internet, however, offers virtually limitless possibilities for reaching either broad or very specialized audiences with information on products and services.

IV. PERPETUATION OF THE ANACHRONISTIC NEWSPAPER/ BROADCAST CROSS-OWNERSHIP BAN UNFAIRLY DISCRIMINATES AGAINST PUBLISHERS AND STATION OWNERS, FAILS TO ADVANCE LEGITIMATE DIVERSITY CONCERNS, AND UNNECESSARILY BURDENS FUNDAMENTAL FIRST AMENDMENT INTERESTS.

A. The Newspaper/Broadcast Cross-Ownership Restrictions Unfairly Single Out Newspaper Publishers and Broadcast Station Licensees, Who Are Denied the Opportunity to Take Advantage of Operational Synergies and Economies While Their Competitors Are Free to Pursue Advantageous Cross-Media Relationships.

As demonstrated in the preceding section, daily newspaper publishers and over-the-air broadcasters compete today in a technologically advanced and highly diverse marketplace for information, opinion, entertainment, and advertising that was

[83] See id. In its Notice of Inquiry, the Commission observes that "local newspapers captured 49% of local advertising expenditures (20.1% of all advertising) as against a total of 13.3% of local advertising (5.5% of all advertising) captured by radio stations." 11 FCC Rcd at 13014 (citation omitted). Those figures, however, fail to distinguish between local retail and classified advertising. According to figures compiled by the NAA, 1995 classified advertising expenditures totaled $13.7 billion (8.5% of total expenditures), while retail ad revenues represented $18.1 billion (11.2%) for daily newspapers. NAA Facts About Newspapers at 10. Moreover, neither the NAA figures nor the McCann-Erickson data cited by the Commission include separate "local" ad figures for many media, e.g., magazines, direct mail, business papers, or farm publications.

unimaginable when the Commission determined, more than twenty years ago, to foreclose future newspaper/broadcast cross-ownership. Moreover, newspapers and broadcast station owners are virtually alone among the major information providers in facing an absolute governmental barrier to common ownership.

Indeed, unlike cable system operators and programmers, DBS, SMATV, and wireless cable service providers, local and long distance telcos, on-line services (e.g., America On Line, Prodigy), software providers (e.g., Microsoft), magazine publishers, and direct mailers, only broadcasters are restricted from publishing a newspaper. Moreover, while newspaper/broadcast combinations are banned, countless other cross-ownerships are entirely permissible, including the following:

- cable/radio
- cable "clustering" (ownership of multiple systems in adjacent areas)
- MMDS/broadcast
- MMDS/telco
- on-line services (America On Line, Prodigy)/cable
- on-line services/telco
- on-line services/broadcast
- software providers (Microsoft)/cable
- software providers/telco
- software providers/broadcast
- telco/broadcast
- telco/DBS

- DBS/broadcast

Further, in the years since the newspaper/broadcast cross-ownership restriction was adopted, the Commission, in some cases at the specific direction of Congress, has eliminated or substantially relaxed almost all of its other broadcast ownership limitations. For example, as the Commission recites in its Notice of Inquiry, "radio ownership limitations have been amended from allowing common ownership of only a single AM and single FM radio station in the same market to the current regulatory regime in which, depending on the number of voices in a market, as many as eight radio stations . . . may be commonly owned."[84] In addition, the Commission first raised and, at Congress' direction, ultimately eliminated the numerical limitations on both radio station and television station ownership, and raised the national television audience share cap from 25 percent to 35 percent.[85]

Similarly, the one-to-a-market rule already has been substantially relaxed, and the Commission is now considering its further relaxation or elimination. Thus, in 1989, the Commission adopted its current "Top 25/30 voices" presumptive waiver standard.[86] In addition, under the "case by case" standard, the FCC now routinely

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[84] Notice of Inquiry, 11 FCC Rcd at 13009.

[85] Broadcast Radio Ownership, FCC 96-90 (rel. Mar. 8, 1996) (eliminating limitations on national radio ownership); Broadcast Television Ownership, FCC 96-91 (rel. Mar. 8, 1996) (eliminating numerical restriction on national television ownership and raising audience reach limit to 35 percent).

[86] Second Report and Order in MM Docket No. 87-7 (Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules), 4 FCC Rcd 1741 (1989) ("1989 One-to-a-Market Decision"), recon. granted in part and denied in part, 4 FCC Rcd 6489 (1989).

allows common ownership of a television station and as many as four radio stations in the same market.[87] Congress, in the Telecommunications Act of 1996, expressly directed the Commission to extend its waiver policies to the Top 50 markets,[88] and the agency is considering how to implement that directive as well as whether it should eliminate the one-to-a-market rule entirely or further relax it in application through an expanded presumptive waiver policy.[89]

The pending television rulemaking proceeding also looks toward the relaxation of the television duopoly rule (from a Grade B overlap standard to "Grade A plus DMA") and asks whether and under what circumstances the Commission should permit common ownership of two television stations in the same market.[90] Finally, Congress in the Telecommunications Act of 1996 repealed the statutory ban on local television/cable cross-ownership, leaving the FCC free to consider elimination of that rule, and directed the Commission to review all of its media ownership regulations

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[87] See, e.g., BREM Broadcasting, 9 FCC Rcd 1333 (1994) (TV/2AM/2FM in Pensacola, FL/Mobile, AL); Louis C. DeArias, Receiver, 11 FCC Rcd 3662 (1996) (TV/2AM/2FM in Spokane, WA).

[88] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(d), 110 Stat. 56, 111 (1996).

[89] See Second Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 and 87-8 (Review of the Commission's Regulations Governing Television Broadcasting), FCC 96-438, ¶¶ 59-79 (rel. Nov. 7, 1996) ("Review of Television Broadcasting Regulations").

[90] See id. ¶¶ 29-58.